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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KUMHO TIRE COMPANY, LTD., KUMHO U.S.A., INC. AND HERCULES TIRE & RUBBER COMPANY, INC.,

Petitioners,

v.

PATRICK CARMICHAEL, AN INDIVIDUAL AND FATHER AND NEXT OF KIN TO PATRICK CARMICHAEL, JR., A MINOR, LUZVIMINDA CARMICHAEL, AN INDIVIDUAL AND MOTHER AND NEXT FRIEND OF CARINA HORN, A MINOR, AND ADMINISTRATRIX OF THE ESTATE OF JANICE HORN, CARINA HORN, A MINOR, LEONA CARMICHAEL, SHAMEELA CARMICHAEL, AND NATIMAH CARMICHAEL,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C., PUBLIC CITIZEN, INC., AND THE CENTER FOR AUTO SAFETY IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

Public Citizen was founded in 1971 as a public advocacy, lobbying, and litigation organization. On behalf of its 120,000 members, Public Citizen has worked throughout its history for a strong civil justice system. In particular, Public Citizen opposes any curtailment in the ability of ordinary citizens to obtain compensation in suits involving faulty or defective consumer products. The organization takes a special interest in cases, such as the suit now before this Court, involving automotive safety, because it has long advocated in this area. Public Citizen believes that a vibrant civil justice system has led to safer vehicles and related components (such as tires).

The Center for Auto Safety is a nationwide consumer organization with approximately 15,000 members that, for more than 28 years, has worked to make automobiles and their component parts safer and more economical. Of particular relevance here, the Center has worked in the courts and before federal regulators on issues involving tire safety, most notably the Firestone 500 tire controversy, which involved hundreds of

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[1]Letters of consent to the filing of this brief have been filed with the Clerk. No counsel for any party authored the brief in whole or in part, and no person or entity other than *amici curiae* made any monetary contribution to its preparation or submission.

injuries and known fatalities and led to the recall of over 15 million defective tires.

Amici are gravely concerned that the restrictive standard of admissibility Petitioners seek in this case would undermine the very purpose of Rule 702 of the Federal Rules of Evidence. The rule Petitioners urge, which would require trial judges to apply the factors set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to areas of expertise where the factors are inappropriate, would only serve the purpose of removing the civil decision-making function from juries and vesting judges with inordinate power over the determination of civil cases. TLPJ strongly opposes Petitioners' effort to improperly circumscribe the role and responsibility of juries in our system of justice and to thereby unconscionably limit access to justice.

SUMMARY OF THE ARGUMENT

The fundamental basis for the designation of a witness as an expert is that the witness has some specialized knowledge that most lay persons on a jury would ordinarily not have, and that the specialized knowledge would assist the jury in its decision-making function. By design, under Federal Rule of Evidence 702, there is a great breadth to this possible testimony, including testimony derived from "knowledge" acquired by education, skill, experience and training, and the standard for admissibility has been a liberal one.

Petitioners and many of their supporting *amici* argue that the gatekeeping required of Rule 702 means that some variation of the four factors specifically discussed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), must be applied in every case involving an expert witness. Such an admissibility requirement for expert testimony is contrary to long-established precedent regarding the admission of expert testimony, both

before and after the adoption of Rule 702, and does violence to both *Daubert* and the purposes underlying Rule 702.

Petitioners' interpretation of Rule 702 would render inadmissible the testimony of many experts who have testified without controversy since the inception of the Federal Rules of Evidence. It would essentially turn *Daubert* – which stressed the "liberal thrust" of the Federal Rules of Evidence and their "general approach of relaxing the traditional barriers to opinion testimony" – upside down. *Daubert* rejected the *Frye* rule excluding novel scientific testimony as unduly restrictive and held that evidence barred under *Frye* would be admissible under Rule 702. By ignoring all of this – the very essence of *Daubert* – and focusing upon language in *Daubert* addressed to the specific type of novel scientific testimony at issue in that case, Petitioners would have this Court create artificial and highly-exclusionary restrictions applicable to all expert testimony. The result would be that more experts would be excluded under *Daubert* than would ever have been excluded under *Frye*, a result this Court could never have anticipated when it held in favor of the Petitioners in *Daubert*.

By urging creation of this new, greatly-heightened standard for admissibility, Petitioners seek to rob the jury of its role as arbiter of the weight and credibility of the evidence. Petitioners' approach would hinder access to justice by increasing summary judicial dismissal of lawsuits. Petitioners' approach would also dramatically increase the necessary costs of litigation, as all parties would be forced to rely increasingly upon academicians who can provide testimony within the confines of Petitioners' parameters, at the expense of traditional witnesses who have long based their opinions upon personal experience and training. Similarly, Petitioners' approach would massively increase the costs to the courts and the litigants, requiring interminable Rule 702 hearings. Neither the drafters of Rule 702 nor this Court in *Daubert* intended such a result.

ARGUMENT

I. RULE 702 WAS SPECIFICALLY DESIGNED TO EXPAND THE ADMISSIBILITY OF A WIDE RANGE OF EXPERT TESTIMONY, PARTICULARLY THAT BASED UPON PERSONAL EXPERIENCE AND TRAINING.

Rule 702 expressly states that its purpose is to admit expert testimony about "scientific, technical, or other specialized knowledge" that will "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed R. Evid. 702. Rule 702 thus contemplates admission of a wide range of expert testimony. As the Advisory Committee Note to Rule 702 states:

> The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training, or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

The drafters of Rule 702 thus expressly intended to admit any specialized testimony that would assist the trier of fact, and *particularly* intended to admit testimony based upon personal experience, *i.e.*, "skill, experience, training and education." There is no indication that the drafters of Rule 702 intended to impose any arbitrary limitations upon the admissibility of expert testimony based upon a scientific methodology or any specific factors. As the Rule itself and the Advisory Committee's note make clear, testimony that may be characterized as "technical" or "skilled" is admissible under Rule 702 if that testimony is based

upon the offering expert's own "knowledge, skill, experience, training, or education," and is relevant under Fed. R. Evid. 401.

II. PRIOR TO *DAUBERT*, COURTS PLAYED A LIMITED GATEKEEPING ROLE – *I.E.*, TO ENSURE THAT EXPERT TESTIMONY WAS RELEVANT AND WOULD ASSIST THE TRIER OF FACT.

Although the term "gatekeeper" arises out of language from *Daubert*, the Federal Rules of Evidence have always imposed on trial courts the role of evidence gatekeepers, whether the evidence comes from experts or other sources. Rule 702 has likewise always required that courts exercise a gatekeeping role in determining whether a particular purported expert should testify in a given case. In the vast majority of cases, the trial judge's gatekeeping function has consisted of determining whether the expert is qualified by some specialized knowledge, whether the testimony is relevant to the issues in dispute, and, primarily, whether the testimony to be offered will be helpful to assist the trier of fact, *i.e.*, that it pertains to a subject and opinions that lay jurors would not be expected to know. As the Advisory Committee stated:

> Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier of fact. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute."

Fed. R. Evid. 702, Notes of Advisory Committee (citation omitted).

Before *Daubert,* there was general agreement among the trial courts as to how to discharge this "gatekeeping" function. The proponent of the expert testimony generally had the burden of establishing a *prima facie* basis for admissibility by showing that there was a particular question in the case for which expert opinion would be helpful, that the expert was qualified, and that the expert by training, education, or experience could testify to that particular issue. Opponents of the proposed testimony could then challenge the admissibility of the testimony in one of three ways: a) in an *in limine* motion or on *voir dire,* challenging the expert by trying to show that the expert was not qualified to render an opinion on the particular subject matter; b) through an argument that the proposed testimony would either not provide assistance to the trier of fact or that it would be more prejudicial than probative; or c) through a challenge to the methodology employed by the expert, primarily on the ground that the methodology was not generally accepted by the relevant community from which it ostensibly was derived, pursuant to the holding in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In order to succeed in this *Frye* challenge, the opponent of the testimony would have the burden of bringing forth affirmative evidence demonstrating that the basis for the testimony was novel and not generally accepted. On the whole, practicing attorneys came to understand which types of experts and testimony would be admissible, and minimal court time was generally expended debating the admissibility of expert testimony.

III. THE COURTS' LIMITED GATEKEEPING ROLE PRIOR TO *DAUBERT* WAS ROOTED IN OUR CIVIL JUSTICE SYSTEM'S CONFIDENCE IN THE ROLE OF JURIES AND THE ESTABLISHED MECHANISMS FOR CHALLENGING WEAK EVIDENCE.

Before *Daubert,* courts favored admissibility of testimony under Rule 702. *See, e.g., In re Japanese Electronic Products Antitrust*

Litigation, 723 F.2d 239, 279 (3d Cir. 1983). The restrained nature of the gatekeeping role played by judges prior to *Daubert* was premised upon the specific language of Rule 702, trust in the power of cross-examination to discern the truth, and a fundamental belief in the role the jury plays as the finder of fact in our system of justice. *Id.*

In part, this last premise derived from the command of the Seventh Amendment. To quote the Chief Justice: "The right to a jury trial in civil cases at common law is fundamental to our history and jurisprudence." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338 (1979) (Rehnquist, J., dissenting).[2] This Court thus has consistently emphasized that "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). Indeed, it is the very "purpose of the jury . . . to sort out the true testimony from the false, the important matters from the unimportant matters, and, when called upon to do so, to give greater credence to one party's expert witnesses than another's. Such matters occur routinely in the American Judicial system, both civil and criminal." *Barefoot v. Estelle,* 463 U.S. 880, 902 (1983) (quoting opinion of district court with approval).

This Court has consistently recognized that adequate discovery, effective trial advocacy, and judicial oversight will prevent

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[2] As Chief Justice Rehnquist noted: "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign or, it might be added, to that of the judiciary." *Id.* at 340-44. The Seventh Amendment commanded courts to maintain the common law distinction between the province of the jury and the court and to defer to juries in resolving matters of credibility and fact-finding. *See Dimick v. Scheidt*, 293 U.S. 474, 486 (1935) (maintenance of the jury as the fact-finding body is central to our history and jurisprudence). *See also Colgrove v. Battin* 413 U.S. 149, 156-57 (1973).

miscarriages of justice as a consequence of phony, but persuasive experts. As stated in *Daubert*:

> [R]espondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence . . .

509 U.S. at 596 (citation omitted).

Consistent with *Daubert*, this Court has repeatedly emphasized that the "opportunity for cross-examination . . . is critical for ensuring the integrity of the fact-finding process." *Kentucky v. Stinger*, 482 U.S. 730, 736 (1987). Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Indeed, cross-examination is the "'greatest legal engine ever invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158 (1974). Or, as was stated by the Eleventh Circuit below, "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433, 1435 (11th Cir. 1997) (quoting *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir. 1996)).

Indeed, in the context of our adversary system, these holdings make perfect sense. Cross-examination often subjects a witness to scrutiny that is longer-lasting, more intense, and more extensive in the breadth of subjects examined than most any process occurring within the course of scientific debate. There are rarely time limits placed on cross-examination. On the stand, a witness may be obliged to endure a line-by-line scrutiny of any article, experience, or evidence the witness seeks to rely upon, being required to explain and defend every point. Moreover,

cross-examination is not limited to the specific parameters of the paper, report, training, or experiences that are the foundation of the expert's conclusion; almost anything the expert has done, said, or written is open to examination. On cross-examination, an expert witness can be subjected to close questioning not only on the basis of the specific sources of the testimony given, but can be impeached by anything he or she has said or written that is potentially inconsistent. An expert's motives and credentials can be scrutinized in ways unimaginable to peer review editors, referees, conference organizers, supervisors, employers, or colleagues. Not surprisingly, then, empirical evidence has shown that lay juries are highly competent as finders of fact in even complex litigation.

Petitioners nonetheless contend it is "common knowledge" that jurors do not handle technical testimony well. Pet. Br. at 24 (citing P. Huber, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 14 (1988)). But that "common knowledge" is anecdotal at best and has no valid empirical support. In the seminal study of jury behavior, KALVEN & ZEISEL, THE AMERICAN JURY (1966), Professors Kalven and Zeisel conclude that their empirical data is "a stunning refutation of the hypothesis that the jury does not understand" the facts. *Id.* at 157. Indeed, their studies "corroborate strikingly the hypothesis that the jury follows the direction of the evidence." *Id.* at 161.

Subsequent scholarly evaluations have confirmed Professors Kalven and Zeisel's conclusions. In 1983, for example, noted evidence scholar Edward S. Imwinkelreid reviewed a large number of empirical studies of jury understanding of complex and scientific evidence. Based on his review of the evidence from these studies, he determined that juries are capable of understanding, weighing, and evaluating complex scientific and medical evidence, and are not unduly influenced even by expert scientific testimony. Imwinkelreid, "The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror

Psychology," 100 MILITARY L. REV. 99, 114-16 (1983). He concluded that there was no "hard empirical evidence" supporting the argument that "a lay jury cannot critically evaluate scientific evidence." *Id.* at 117. In a more recent analysis of juror behavior studies, Professor Neil Vidmar agreed, determining that "no justifiable scientific basis exists to support" the claims of commentators like Huber and others critical of the jury system. Vidmar, "Pap and Circumstance: What Jury Verdict Statistics Can Tell Us about Jury Behavior and the Tort System," 28 SUFFOLK U. L. REV. 1205, 1206 (1994). His analysis of the research, "in most respects, gave [the jury] a favorable grade for performance of its assigned tasks. *Id.* at 1234.

IV. PRIOR TO *DAUBERT*, COURTS IN CERTAIN TYPES OF CASES STRUGGLED WITH AN UNNECESSARILY RESTRICTIVE STANDARD FOR EVALUATING THE ADMISSIBILITY OF EXPERT TESTIMONY.

Given the constitutional mandate and the judiciaries' own abiding belief in the jury system, it is instructive to look at those limitations on the testimony of experts that existed before this Court's decision in *Daubert*. Before *Daubert*, the major judicial departure from strict adherence to Rule 702 was reliance on the pre-Rule 702 holding in *Frye v. United States*, 293 F. 1013 (2d Cir. 1923). *Frye* purported to limit expert testimony regarding novel scientific evidence on the theory that a trier of fact could be misled by such evidence (in that case the precursor to the polygraph test). The shortcomings of the *Frye* test set the stage for this Court's ruling in *Daubert*.

Following *Frye*, courts essentially held that, when testimony was not based upon personal experience or training, but rather upon an interpretation of scientific data resulting from a novel test (*e.g.*, a polygraph test) or on the interpretation of someone else's scientific research and writings (*e.g.*, an epidemiologist's

evaluation), the testimony offered had to be based on scientific principles that were generally accepted in the relevant scientific community. The *Frye* test, however, caused a number of problems for the federal courts.

Under *Frye*, courts struggled with trying to select the "relevant scientific community" and the level of agreement needed for "general acceptance." *See generally U.S. v. Downing*, 753 F.2d 1224, 1236 (3d Cir. 1985). These issues were particularly problematic in cases involving the effects of chemical and pharmaceutical agents and toxicological and epidemiological expert evidence. Thus, some courts differed over whether the extrapolation of the results of animal testing could be applied to humans. *See, e.g., In re: Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 853 (3d Cir. 1990), *cert. denied*, 499 U.S. 961 (1991); *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 831 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 882 (1989). Courts also struggled over whether an expert who based his opinions on a review of another's work needed to rely only on published, peer-reviewed data. *See, e.g., Richardson v. Richardson-Merrell, Inc.*, 857 F.2d at 831. Some courts were further conflicted by situations where an expert based opinions upon epidemiology studies performed by others, questioning whether such studies must demonstrate "statistical significance" before testimony based upon them could be admitted. *See, e.g., DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 955 (3d Cir. 1990); *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307, 312, *modified*, 884 F.2d 166 (5th Cir. 1989), *cert. denied*, 494 U.S. 1046 (1990).

As courts struggled to apply the *Frye* test, eminent evidence scholars decried restrictions on expert testimony. Wigmore and McCormick had complained "for decades about common-law restrictions on opinion evidence that deprived triers of fact of valuable information needed for sounder adjudications." Berger, *"United States v. Scop*: The Common Law Approach to an Expert's Opinion about a Witness's Credibility Still Does Not

Work," 55 BROOKLYN L. REV. 559 (1989). It was recognized that, "as technology advanced and expert testimony became more important in the resolution of increasingly complex litigation, unnecessary impediments [specifically, *Frye*] became unacceptable." Weinstein, "Improving Expert Testimony," 20 U. RICH. L. REV. 473, 477 (1986).

V. THE MAIN THRUST OF *DAUBERT* WAS TO LIBERALIZE THE TEST FOR EVALUATING THE ADMISSIBILITY OF EXPERT EVIDENCE.

In this context, the core holding of *Daubert* was this Court's rejection of the defendant's argument that the "general acceptance" test articulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), should govern the admissibility analysis. Instead, this Court concluded that the "rigid general acceptance requirement would be at odds with the liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers to 'opinion' testimony." *Daubert*, 509 U.S. at 587.

Other essential points of this Court's decision in *Daubert* are as follows:

- Fed. R. Evid. 402 allows "all relevant evidence" and "provides the baseline," while the standard of relevance under Rule 401 is a "liberal one." *Daubert*, 509 U.S. at 587.

- Fed. R. Evid. 104(a) and 702 provide the framework for determining the admissibility of expert scientific testimony in federal courts. *Id.* at 587-93.

- *Daubert* rejected the defendant's argument that the "general acceptance" test articulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), should govern the admissibility analysis, and agreed with the plaintiff that the standard for admissibility should not be so "rigid." *Id.* at 587-88.

- The Court concluded that the "rigid general acceptance requirement would be at odds with the liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers to 'opinion' testimony." *Id.* at 588.

- Although the Court offered "general observations" that could bear upon the "reliability" of scientific evidence, the Court stressed that "[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test," and "emphasized" that the inquiry is a "flexible one." *Id.* at 593-94.

- The Court held that expert scientific testimony is "relevant" or "fits" if it relates to an issue at hand, *i.e.*, if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 591.

- Finally, the Court noted that if the "scintilla of evidence presented" is "insufficient," a trial judge "remains free to direct judgment" or "grant summary judgment" under the standards applicable to those "conventional devices," but not to resort to "wholesale exclusion" under Rule 702. *Id.* at 596.

Daubert of course did not simply stop with a declaration that the *Frye* rule was inapplicable in federal court. Recognizing the very real problem that trial courts were having with certain epidemiological and toxicological testimony to which *Frye* was being applied and which was at issue in the *Daubert* case, this Court attempted to provide guidance on how to implement Rule 702 of the Federal Rules of Evidence with respect to testimony that was based almost entirely on a witness's interpretation of studies performed by others.

To do so, this Court set forth factors for evaluating the testimony of a particular type of *scientist* (an epidemiologist) about a particular type of scientific question (whether a pharmaceutical drug may cause birth defects). In analyzing this

testimony from the scientific field of epidemiology, *Daubert* used an essentially epistemological approach to define the term "scientific knowledge" as it is used in Rule 702. This Court addressed the question of how an epidemiologist would come to know a proposition as true and discussed objectively reliable standards governing that very particularized process. The Court then listed four non-exclusive factors which often are used to evaluate the methodology underlying the type of novel scientific, *i.e.*, epidemiological, testimony which was at issue in the specific case before the Court.[3]

VI. THE EXPERT TESTIMONY AT ISSUE IN THIS CASE WOULD HAVE BEEN ADMISSIBLE EVEN UNDER THE STANDARD THAT PREVAILED BEFORE *DAUBERT*.

The expert testimony in *Daubert* was based upon the experts' drawing causal inferences from a review and synthesis of the work of others. It was not, as here, based on personal experience and particularized training. Yet, given that this Court in *Daubert* overruled *Frye*, expressly urging a more liberal allowance of expert testimony than had previously prevailed, it is instructive to look at whether the testimony of Dennis Carlson, the tire expert in this case, would have been permitted in the *Frye* era.

Before 1993, in cases such as this one, courts often considered and rejected efforts to exclude the testimony of tire failure experts whose testimony was based on practical first-hand experience. In

[3] Quite a few courts have recognized the epistemological underpinning for the "factors" listed in *Daubert*. *See, e.g., Iacobelli Construction Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir. 1994) (case does "not present the kind of 'junk science' problem *Daubert* meant to address"); *Smith v. Ford Motor Co.*, 882 F. Supp. 770, 774 (N.D. Ind. 1995) ("*Daubert*'s focus appears to be on 'novel scientific evidence' and the ' junk science' problem"); *Gentry v. Mangum*, 466 S.E.2d 171, 185 (W. Va. 1995) (*Daubert* dealt with "junk science").

Smith v. Uniroyal, Inc., 420 F.2d 438, 442 (7th Cir. 1970), for example, the Seventh Circuit did not require that an expert base his opinion about the cause of a tire failure on elaborate scientific testing, peer review, or even manufacturing experience. Rather, the testimony was permitted based on the expert's personal experience handling and selling tires of national manufacturers at a service station for 22 years. Even though the expert had no formal training in the causes of tire failure and no experience in the manufacture of tires, his job required him to evaluate 50-75 tire failures per year in order to make price adjustments. Based on this experience, the expert testified that he could look at a tire for less than a minute and tell the difference between a tire that failed due to a road hazard and one that failed because of a construction defect. He had learned to do that as a tire salesman in order to determine whether the user would get an adjustment from the manufacturer for a failed tire. The issue in that case, like this case, was simple: was the failure due to a defect that was the responsibility of the user or of the manufacturer? In permitting the expert to testify, it did not matter to the court in *Smith* that the expert did not know whether the defect in the tire about which he testified was due to materials or workmanship. *Id.* at 442.

Following the same type of pre-*Daubert* inquiry done in *Smith*, there would have been no question regarding the admissibility of Carlson's testimony in this case. In comparison to the tire expert there: 1) Carlson spent 10 years in tire research at a tire manufacturer, Michelin; 2) he had performed thousands of control failure simulation tests on Michelin and other tires, some of which were designed to isolate causes for tire separation; 3) he had teaching experience at Michelin; and 4) he had coursework in tire failure forensics. Carlson also spent an hour physically examining the tire in question, as well as the other three tires on the vehicle, read the accident report and maintenance records for the vehicle, and reviewed photographs of the van and the accident scene. Carlson based his opinion upon his experience and training and his physical examination of the tire in question. He drew

inferences from what he saw in that tire compared to results in performing many other such examinations. As *Smith* reveals, under a pre-*Daubert* analysis, Carlson would have been permitted to testify.

This does not mean, of course, that, if Carlson had been permitted to testify, the plaintiffs would have won at trial – only that his testimony would have been considered. The defendants would still have had every opportunity to test Carlson's testimony in the crucible of cross examination, and to argue to the jury that Carlson should not be believed.

Instead of addressing their arguments to the jury, however, Petitioners essentially ask this Court to evaluate the weight to be accorded to Carlson's opinion. For example, Petitioners deride Carlson for only personally viewing the tire in question for an hour before his deposition. While there seems to be little dispute that he could fully view the tire in an hour (as opposed to the minute in *Smith, supra),* Petitioners complain that he saw the tire too close in time to when he rendered his opinions. This quibble goes to the weight of the testimony at best, and not to its admissibility. The question of "when" and "how long" are matters for Petitioners to use in impeaching Carlson's testimony on cross-examination. That Carlson was asserted to have missed some physical evidence in his investigation, which was represented to be important to Petitioners' experts when they personally examined the tire, also may be addressed on cross-examination.

Petitioners' attack on Carlson might have won them a victory at trial prior to 1993, but it would not have prompted the exclusion of his testimony. Before *Daubert,* courts had no difficulty holding that non-academic and non-scientific witnesses could testify in product failure cases, even though the experts may never have designed or tested the exact type of product in question or supported the opinion by any type of literature. For example, the

Eighth Circuit held that an owner and operator of a body and fender shop who had been in the auto repair business for 18 years and who had frequently examined wrecked cars, including their suspension systems, possessed sufficient knowledge and practical experience to testify whether a particular ball joint of the car's suspension system was defective. *Moran v. Ford Motor Co.,* 476 F.2d 289, 291 (8th Cir. 1973). While the expert's testimony might not have been based upon any testing or peer review of the relevant literature, the court held that he had sufficient experience to judge a defective ball joint. He also clearly had specialized knowledge that would assist the jury. *See id.*

Moreover, in most product design cases before *Daubert*, expert testimony was based on a blend of experience and academic training. Direct experience designing and testing the actual product or similar products was not required, and would inherently have limited the number of possible experts to a select few individuals, particularly in those states requiring a reasonable alternative design. For instance, in *Stempel v. Chrysler Corp.*, 495 F.2d 1247 (5th Cir. 1974), a registered professional engineer who had investigated approximately 1,800 accidents involving vehicles testified on the design of a padded dashboard, even though he had no practical experience in designing automobile dashboards himself.

Even in seemingly highly "technical" air crash cases, pre-*Daubert* courts did not require experts to be aeronautical engineers. Thus, a witness who had a doctorate degree in metallurgical engineering and experience investigating helicopter accidents could testify that there was a faulty design in a helicopter rotor. *Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron*, 805 F.2d 907, 919 (10th Cir. 1986). Similarly, an expert who had been assistant chief flight engineer for an airline for 11 years and had investigated about 30 cases of airplane engine overspeed, while reviewing hundreds of other cases in air force reports, was allowed to testify as an expert

witness in an airplane crash case. *Noel v. United Aircraft Corp.*, 342 F.2d 232, 235-36 (3d Cir. 1964). Each of these experts relied on their personal experience and observations, backed by research and academic training to testify. There was no error rate or peer review on which to base their testimony, and it would have been cost-prohibitive if a court actually required physical testing of their opinions before they were permitted to testify.

It is thus clear that pre-*Daubert* courts routinely permitted testimony from a wide variety of witnesses who qualified as experts because of their specialized knowledge, gained through experience.[4]

VII. PETITIONERS' APPROACH WOULD BE MORE RESTRICTIVE THAN THE STANDARD THAT PREVAILED BEFORE *DAUBERT*, AND IS THUS CONTRARY TO THE LIBERALIZING THRUST OF *DAUBERT*.

As shown above, the expert testimony at issue in this case would certainly have been deemed admissible under the standards in place before *Daubert*, and *Daubert* itself sought to liberalize those standards. However, the approach advocated by Petitioners, which was employed by the district court below, would turn *Daubert* on its head. The district court mechanistically applied *Daubert*'s four *suggested* factors for evaluating epidemiological testimony and predictably found them entirely unhelpful in assessing the reliability of Carlson's tire failure analysis. Notwithstanding that, the court never examined the nature of the expertise in question to determine what factors should be

[4] Professor Imwinkelreid has listed numerous examples, including auctioneers, bankers, railroad brakemen, business persons, carpenters, farmers, security guards and trapshooters. *See* Imwinkelreid, "The Next Step After *Daubert:* Developing a Similarly Epistemological Approach to Ensuring the Reliability of Non-Scientific Expert Testimony," 15 CARDOZO L. REV. 2271, 2278 (1994).

considered as appropriate indicia of reliability. Instead, it applied the *Daubert* factors in a wooden manner, holding that this Court dictated that it "must" apply those factors. 923 F. Supp. at 1520.

Unfortunately, this misinterpretation has been shared by a number of other courts, leading to quite uneven and unpredictable results. For example, in *Hanks v. Korea Iron & Steel Co.*, 993 F. Supp. 1204 (S.D. Ill. 1998), an expert's testimony that failed wire rope was "more probably than not" made by a defendant was excluded despite the fact that the expert was a registered professional engineer with over 30 years of experience in the wire rope industry. Although he performed both physical and chemical analyses of the failed wire and compared it to defendant's wire and concluded that the two were highly similar, the court excluded his testimony because the expert's physical and chemical analyses: 1) were not subject to peer review; 2) had not been evaluated in light of the potential rate of error; and 3) were not shown to be generally accepted. *Id.* at 1208-10.

Similarly, in *Watkins v. Telsmith, Inc.*, 121 F.3d 984 (5th 1997), the court believed that *Daubert* had changed the interpretation of Rule 702. Plaintiff in that case relied on a pre-*Daubert* case, *Dixon v. International Harvester*, 754 F.2d 573 (5th Cir. 1985), where a similar expert with similar credentials had been permitted to testify. The court rejected *Dixon* as precedent, because the prior court's analyses "reflect a pre-*Daubert* sensibility." *Id.* at 992.

Along the same lines, in *Bogosian v. Mercedes-Benz of North America, Inc.*, 104 F.3d 472 (1st Cir. 1997), the court upheld the exclusion of witness testimony about defects in an automobile transmission design. The witness had extensive experience as a mechanic, had investigated many product cases, had testified as an expert 126 times, and had personally performed tests on the subject vehicle to determine whether the alleged defect in the vehicle existed. His tests showed that the alleged defect did exist

in the subject car and he had a corrective solution. The court looked at his "methodology" and rejected it because there was no evidence this was a "known technique." *Id.* at 478. The factors upon which the court made its decision were factors that went to the weight rather than the admissibility of the testimony.

Even more troubling has been the use of *Daubert* to require product defect experts to actually design and test any suggested alternative designs before being allowed to testify. For example, in *Cummins v. Lyle Industries,* 93 F.3d 362 (7th Cir. 1996), involving an allegedly defective trim press, an expert was not allowed to testify about his alternative trim-press designs. The court held that the expert lacked a reliable basis for his testimony because he had never tested his alternative designs. The court found that, because the "opinions offered . . . in this case clearly lend themselves to testing and substantiation by the scientific method, . . . the absence of such testing indicated that the witness' proffered opinions could not fairly be characterized as scientific knowledge." *Id.* at 369.

The kind of testing the court required in *Cummins* is often impossible to obtain or prohibitively expensive. Would such testing be required if the defect was in a nuclear submarine? Dismissal of a case due to the failure to conduct actual design and feasibility testing of an alternative design would deny access to justice to vast numbers of personal-injury and breach-of-contract plaintiffs. Yet, this is precisely what one court has concluded that *Daubert* meant to require. In *Stanczyk v. Black & Decker, Inc.* 836 F. Supp. 565 (N.D. Ill. 1993), the district court excluded testimony from a mechanical engineer who had worked for the defendant because he had not actually engineered, built, and tested his alternative design. When the plaintiff complained that this added requirement for his expert would put the case beyond his financial ability, the court acknowledged that its interpretation of *Daubert* would result in substantial additional expense to the plaintiff and then dismissed the case anyway. The court found

that "it is the very nature of Rule 702 and *Daubert* that requires those expenditures. Proof of any kind is often expensive to gather. Scientific reliability and validity in our times is seldom cheap . . . ." *Id.* at 568.

On the other hand, it is fortunate that these examples have been aberrant and the majority of courts considering such post-*Daubert* cases have concluded correctly that the so-called *Daubert* factors are required only where the testimony would have been previously evaluated for general acceptance pursuant to *Frye*. Thus, courts in at least the Second, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits have concluded that the intense scrutiny using the factors set forth in *Daubert* is justified only where the case involves science that is novel or controversial. *See, e.g., Iacobelli Construction, Inc. v. County of Monroe*, 32 F.3d 19 (2d Cir. 1994) (construction expert affidavits were not the kind of "junk science" that factors in *Daubert* were meant to address); *U.S. v. Jones*, 107 F.3d 1147 (6th Cir.), *cert. denied*, 117 S. Ct. 2527 (1997) (hand-writing expert); *United States v. Sinclair*, 74 F.3d 753, 757 (7th Cir. 1996) ("*Daubert* does not create a special analysis for answering questions about the admissibility of all expert testimony."); *U.S. v. Cordoba*, 104 F.3d 225 (9th Cir. 1997); *Masayesva v. Hale*, 118 F.3d 1371, 1379 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1098 (1998) (agricultural economist was qualified to testify about value of grazing on Hopi land and *Daubert* standards were held not applicable to "relatively straightforward application of range economics, rather than a novel scientific theory"); *Compton v. Subaru of America*, 82 F.3d 1513 (10th Cir.), *cert. denied*, 117 S. Ct. 611 (1996); *Ambrosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996), *cert. dismissed*, 117 S. Ct. 1572 (1997).

Even courts which felt that they were obligated to consider the *Daubert* factors have recognized the difficulty in applying them. *See Kannankeril v. Terminix Int'l Inc.*, 128 F.3d 802, 809 (3d Cir. 1997) (lack of peer review or publication was not dispositive

where expert's opinion was supported by "widely accepted scientific knowledge"); *Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2409 (1997) (*Daubert* factors not applicable to testimony from a sociologist).

These courts have recognized that, where specialized knowledge derives from personal observations and experience, the *Daubert* factors are inapplicable and often are not capable of providing a reasonable means for assessing the admissibility of testimony. In most fields of "knowledge," there are no peer reviews *per se* and opinions would be difficult, if not impossible, to "test." Even the District Court below, while concluding it was obligated to apply the *Daubert* factors, recognized that the factors could not be applied to every expert testifying based on "scientific" knowledge.

As Professor Imwinkelreid has pointed out:

> Neither the essential test enunciated in *Daubert*, nor the factors listed by the Court are applicable to nonscientific opinion. The *Daubert* test is grounded in the scientific process and directs the judge to evaluate the quality of the testing supporting the scientific conclusion. . . . Since nonscientific opinions do not rest on replicable experiments, such opinions cannot be validated by the classic methods of Newtonian science. . . . The upshot is that for the admissibility of scientific evidence, that test is useless as a criterion for the admissibility of other types of expert testimony.

Imwinkelreid, "The Next Step After *Daubert*: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony," 15 CARDOZO L. REV. 2271, 2283-85 (1994).[5]

[5] In fact, even in the majority of scientific endeavors, the *Daubert* factors of "error rate" and "general acceptance" may not be significant. *See* Marino & Marino, "The Scientific Basis of Causality in Toxic Tort Cases," 21 DAYTON L. REV. 1, 31 n.95 (1995).

VIII. THE APPROACH REQUESTED BY PETITIONERS WOULD BE A DRAMATIC AND UNWISE DEPARTURE FROM LONG-ESTABLISHED FEDERAL EVIDENCE LAW.

If the Court were to adopt the rule urged by the Petitioners, new requirements would be added to Rule 702 and much traditional expert testimony would be subject to difficult or impossible standards. The "liberal thrust" of the Federal Rules, and their "general approach of relaxing the traditional barriers to opinion testimony," would be turned on its head. Considering that many state courts have adopted Rule 702 and follow this Court's lead, such an interpretation of *Daubert* and Rule 702 would eventually alter the day-to-day practice of law in nearly every court in the country.

In the vast majority of cases that are heard on a day-in, day-out basis, testimony of experts is usually based upon an application of the expert's experience, training and/or education.[6] The skill or

[6] Among hundreds of examples are fire and explosion cases. *See, e.g., U. S. v. Marler*, 614 F.2d 47 (5th Cir. 1980) (deputy state marshal testified based on knowledge derived from investigating fires for 11 years.); *Welders Supply, Inc. v. American Emp. Ins. Co.*, 342 F.2d 972, *on rehearing*, 358 F.2d 593 (6th Cir. 1965) (witness with lifetime experience in gas industry could express opinion about source of explosion). Other examples include the owner of a soil and feed testing service with practical experience in feed-related health issues who can testify about physical condition of the herd. *See Circle J Dairy, Inc. v. A.O. Smith Harvestore Products, Inc.*, 790 F.2d 694 (8th Cir. 1986). Plaintiff-farmer was allowed to give expert testimony about feeding and care of chickens, egg production, and estimation of life of chicken coop because he had raised chickens and handled coops most of his life. *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. 1967). *See also Hanna v. Fletcher*, 261 F.2d 75, 104 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 912 (1959) (ironworker); *Walton v. Sherwin-Williams Co.*, 191 F.2d 277 (8th Cir. 1951) (crop pilot expert).

specialized knowledge required of the expert has generally depended on the task and the stakes of the litigation at hand. For instance, if expert testimony is needed regarding the approximate speed of a vehicle or the cause of an accident, testimony will normally be elicited not from an accident reconstructionist but from a policeman who might be permitted to draw opinion inferences based upon his experience and observations. *E.g., Kelsay v. Consolidated Rail Corp.*, 749 F.2d 437 (7th Cir. 1984); *Bonner v. Polacari*, 350 F.2d 493 (10th Cir. 1965). In real estate evaluation cases, testimony might be provided by farmers who answer from personal knowledge, *Ruud v. U. S.*, 256 F.2d 460, (9th Cir. 1958), *cert. denied*, 358 U.S. 817 (1960), or from a rent inspector with prior experience as a real estate broker. *Mason v. Woods*, 172 F.2d 857 (Em. App. 1949). *See also U.S. v. 1040.30 Acres of Land,* 144 F. Supp. 199 (W.D. La. 1956) (buyer and seller of residential subdivision properties).

It is highly questionable whether any of these experts would be permitted to testify if Rule 702 were interpreted to require strict application of the four *Daubert* factors. Many cases would be dismissed or could never be litigated because of the cost or unavailability of a scientific expert on the most routine or mundane topics. Courts would be bogged down in time-consuming and costly *Daubert* hearings on the admissibility of virtually every expert, squandering the resources of the courts and litigants. Indeed, even at present, in many jurisdictions all that is necessary to initiate an extended, expensive, and time-consuming pre-trial process is a mere unsupported notice of a *Daubert* challenge by the opponent of the proffered expert testimony.[7] In

[7] For instance, as is noted in *In re TME Litig. Cases Consol. II,* 922 F. Supp. 997, 1005 (M.D. Pa. 1996), the district court stated that it had accommodated "the parties for two rounds of *in limine* hearings which required clearing the court's calendar for most of November 1995, part of February 1996, and part of March 1996." *See also* Roisman, "The Courts, *Daubert*, & Environmental Torts: Gatekeepers or Auditors?," 14 PACE ENVT'L L. REV. 558 (1997).

these courts, the expert testimony is then often rendered presumptively inadmissible, because it is the proponent of the testimony who is then required to prove that the testimony will comport with the mechanically applied *Daubert* factors.

Clearly, nothing in *Daubert* indicates, or even hints, that this Court intended such a major change in Rule 702. As the Fifth Circuit has explained, *Daubert* "did not otherwise work a sea change over federal evidence law." *U.S. v. 14.38 Acres of Land*, 80 F.3d 1074, (5th Cir. 1996) (citing *United States v. Sinclair*, 74 F.3d 753, 757 (7th Cir.1996) ("*Daubert* does not create a special analysis for answering questions about the admissibility of all expert testimony.")). *Daubert's* holding only articulates what the Federal Rules of Evidence have always held was the trial court's traditional "gate keeping" task of determining "whether proffered evidence is sufficiently reliable and relevant, and thus presumptively admissible unless excludable on some other ground." 80 F.3d at 1078.

In the vast majority of cases using experts, trial courts are perfectly capable of evaluating the qualifications and admissibility of expert opinion the way they have for decades: by direct foundation testimony from the expert describing his or her background, education, and experience in the field, the work that was done in gathering and analyzing the facts at issue, and the methods used in reaching the opinions. Petitioners' restrictive interpretation of Rule 702 would mean that personal observations and direct experience, which were the *sine qua non* of the common law, would now count for close to nothing. Even if an expert's methods were generally accepted under *Frye* standards, under Petitioners' formulation the testimony could still be excluded for not meeting the other "required" factors. The results of such a formulaic and mechanical approach will inevitably be uneven and woefully unfair.

Yet, rejecting Petitioners' proposed approach does not mean that courts will be abdicating their "gatekeeping" role. It only means that balance will be maintained between the role of the gatekeeper and the role of the fact finder. It means that the work of trial courts need not be excessively burdened by requiring, in every case, a *Daubert* analysis of factors and scrutiny of methodology. It means that, consistent with the Federal Rules, the traditional barriers to the admissibility of expert testimony would be lowered or, at best, kept the same – not, as Petitioners and their *amici* urge, greatly heightened. Any other interpretation of *Daubert* and Rule 702 would severely limit the ability of the aggrieved whether in contract, tort or otherwise to gain fair, reasonable, and economical access to our legal system.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

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